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No. 469

IN THE

Supreme Court of the United States

October Term, 1969

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

PEPSI-COLA BUFFALO BOTTLING COMPANY and SQUIRT-VERNORS OF BUFFALO, INC.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CICRUIT

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Questions Presented

1. Whether or not respondent as a party accused of an unfair labor practice, has been deprived of the procedural due process guaranteed to it by § 10 of the National Labor Relations Act, as amended, and by the Administrative Procedure Act?

2. Whether or not the application of the Board's "Rule Against Relitigation" has deprived respondent of any of the procedural rights or safeguards afforded by the said statutory provisions?

3. Whether or not the combined effect of the Board's limited standard of review and representation cases and the application of its "Rule Against Relitigation" in this

unfair labor practice proceeding has deprived respondent of its statutory right to the mandatory, plenary, *de novo* review which the Board is required to grant to a party accused of an unfair practice?

4. Whether or not the result of the Board's action was an unlawful subdelegation to its Acting Regional Director of the Board's power and responsibility for deciding whether or not an unfair labor practice has been committed?

Statute and Rules Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, *et seq.*) and of the NLRB Statements of Procedure (29 C. F. R. 101.20 (c)) are set forth in App. A, *infra*, p. 11.

Statement

The respondent accepts the statement set forth in pages 2 through 6 of the petition except as hereinafter set forth.

When an unfair labor practice complaint issued under the authority of Section 10 of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. § 141 *et seq.*), herein called the "Act", the Company answered the complaint admitting the certification and its refusal to bargain but again asserting the Board's lack of jurisdiction on the ground that the distributors were in fact independent contractors. The General Counsel filed a "motion for summary judgment" calling for application of the Board's so-called rule against the relitigation of previously determined issues. The Company filed a response to the motion, detailing its objections to such summary procedure and claiming its rights as an accused in an unfair labor practice proceeding to the administrative due process guaranteed by

Section 10 of the National Labor Relations Act and by Sections 5, 7, 8 and 11 of the Administrative Procedures Act, as amended, 60 Stat. 237, 5 U. S. C. 1001 *et seq.*, herein called "APA". The Board sustained the "motion for summary judgment," refusing to consider the evidence as to the status of the distributors as independent contractors, and entering a conclusory finding on the basis of the Acting Regional Director's decision that all of the distributors are employees within the meaning of Section 2(3) of the Act.

Reasons for Denying the Writ

None of the reasons set forth by the petitioner are valid reasons for this court's granting the writ requested herein. The following arguments will attempt to refute those reasons set forth in the petition.

1. As to petitioner's first reason, petitioner overlooks the fact that an unfair labor practice complaint is a completely different type of a proceeding from a representation case and that the employer herein, the respondent, did not ask to relitigate the issues in the unfair labor practice proceeding. Merely, the respondent asked that the Board weigh the evidence brought out in the representation case in making their determination in the unfair labor practice proceeding. Respondent has always contended that it has been deprived of the statutory rights and protections guaranteed to parties accused of unfair labor practices by the Administrative Procedure Act (herein called the "APA") and by the National Labor Relations Act, as amended herein called the "Act").

The case of *Pittsburgh Plate Glass Co. v. National Labor Relations Board,* 313 U. S. 146, 61 S. Ct. 908 (1941) involved

exclusion of evidence. Although the language of the Court's opinion in Pittsburgh Plate Glass and the context in which it was uttered should suffice, in itself, to demonstrate that petitioner's arguments are thereby foreclosed, it is submitted, in addition, the unalterable fact that the APA HAD NOT BEEN PASSED AT THE TIME THE PITTSBURGH PLATE GLASS DECISION WAS HANDED DOWN. As a matter of fact, the APA did not become law until six years later in 1947.

Finally, by way of further reinforcement, is the fact that in 1941, when the Pittsburgh Plate Glass decision was handed down, Section 10(c) of the National Labor Relations Act read as follows:

> "The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaged in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice . . ."

In 1947 that section was Amended in relevant part by the Labor Management Relations Act as follows:

> ". . . IF UPON THE PREPONDERANCE OF THE TESTIMONY TAKEN the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, . . . etc." Section 10(c).

The 1947 amendments also added the requirement, for the first time, that complaint proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States . . ." Section 10(b).

Since neither statute had been enacted arguments based upon the denial of the procedural rights guaranteed by the APA and the LMRA, could not have been before this Court in the Pittsburgh Plate Glass case. Nor have these issues been dealt with or even alluded to in any of the subsequent United States Courts of Appeals decisions upholding application of the Board's rule against relitigation.

Again, it must be emphasized that respondent has not asked leave to submit additional evidence before the Board. The objection is not to the Board's refusal to grant a hearing *de novo* on a proceeding properly delegated to a regional director, but its refusal to review what that official has decided and to make its own determination as to whether the regional director's decision was right.

2. As to petitioner's second reason, which claims that Congress desires the regional directors "to act in all respects as the Board itself would act" and make a "final determination" of representation issues, subject to such review as the Board might provide, it must be emphasized that this still does not delegate to the regional director the right to decide unfair labor practice proceedings.

The petitioner states that Congress felt that the grant of this power was justified in order to carry out the objective of expediting case handling. However, this Court in commenting on a court review of an unfair labor practice proceeding did not interpret the desires of Congress to expedite cases as being so high in priority as to abandon the rights of the employer. *Boire v. Greyhound Corp.*, 376 U. S. 473, 84 S. Ct. 897 (1964). This was pointed out in Boire v. Greyhound Corp. when this Court said, at 376 U. S. 479 and 84 S. Ct. 894 as follows:

> "That this indirect method of obtaining judicial review imposes significant delays upon attempts to chal-

lenge the validity of Board orders in certification proceedings is obvious. But it is equally obvious that Congress explicitly intended to impose precisely such delays."

In addition, "Congress has determined that the price of greater fairness is not too high." *Wong Yang Sung v. McGrath*, 339 U. S. 33, 46-47, 70 S. Ct. 445, 452 (1950). The procedural safeguards of the APA and NLRA were established by Congress in response to strong demands for reform in administrative procedure. The Board, unlike the petitioner, has "ready and persuasive access to the legislative ear" (*Ibid.*), and if error was made by including all complaint preceedings within the coverage of the APA and by surrounding these proceedings with procedural safeguards contained in the Act itself, "relief from Congress is a simple matter." *Ibid.* The application of the rule against relitigation in the context of this case should not be sanctioned.

3. In response to reason three of the petition, it should be noted that the petitioner's argument is that the Board would have to review the record in the unfair labor practice proceeding "even though it had satisfied itself in an appellate capacity in the representation proceeding that the regional director's decision did not warrant review." This fully points up the standards in the two different proceedings which supports the position of the respondent. At no point, does the Board in the representation case see the record, but, on the contrary, the Board reviews a "self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record." NLRB Rules and Regulations §102.67, 29 C. F. R. 102.67.

Again, it must be remembered "that the price of greater fairness is not too high." The fact that the result of an

unfair labor practice can result in the potential finding of contempt is something that must be considered, whereas a representation case is specifically stated to be "non-adversary in character" by NLRB Statements of Procedure § 101.20 (c), 29 C. F. R. § 101.20 (c).

The rights given by the APA and the Act do not exist in a vacuum, but are part and parcel of specific Congressional policy decisions made in response to the problems posed by the emergence of federal administrative agencies as the "fourth branch" of the federal government. They exist in order to insure that the rights of private litigants will not be sacrificed in favor of the need for expeditious determination of individual cases. *Ramspeck v. Federal Trial Examiners Conference,* 345 U. S. 128, 73 S. Ct. 570 (1953); *Wong Yang Sung v. McGrath, supra.*

It may be so that a representation case should be expeditiously handled, however, it is submitted that this should not be done by the abandonment of the rights of private litigants.

4. In response to petitioner's fourth reason which claims that the decision below is in essential conflict with this Court's decision in *NLRB v. Duval Jewelry Co.,* 357 U. S. 1, 78 S. Ct. 1024 (1958), it is submitted that there is no inconsistency. The controversy there grew out of the issuance of subpoenas in the course of representation proceedings. The relevant statute [section 11(1) of NLRA, 29 U. S. C. § 161(1)] gave a person served with a subpoena *duces tecum* the right to "petition" the Board to revoke, and provided that "the Board shall revoke the subpoena if in its opinion", the statutory requirements were not satisfied. After the issuance of the subpoenas in question, the employer moved that the Board revoke them. The Board refused to entertain this motion to revoke on the ground that, under its Rules and Regulations, such motions

require "an initial ruling by the hearing officer" (357 U. S. at 4, 78 S. Ct. at 1026). Subsequently, the hearing officer, after granting an opportunity for a hearing, denied the motions to revoke. That ruling was not appealed to the Board, and when the employer refused to comply with the subpoenas, the Board commenced a proceeding to enforce them. The District Court and Court of Appeals had ruled in the employer's favor, holding that, under the above provision of section 11(1), the Board alone could rule on motions to revoke subpoenas *duces tecum* in representation proceedings.

Emphasizing (a) that the Board's Rules provided machinery for appealing the regional director's denial of the employer's motion to revoke—machinery which the employer had not attempted to utilize in that case—and (b) the preliminary nature of the regional director's ruling on the employer's motion to revoke (357 U. S. at 5-8, 78 S. Ct. at 1027-28), this Court upheld this delegation by the Board of "the right to make a preliminary ruling" on the motion to revoke (357 U. S. at 7, 78 S. Ct. at 1028). In so ruling, this Court was careful to note that the officer before whom the representation proceeding was held:

> "does not, of course, have the final word. Ultimate decision on the merits of all the issues coming before him is left to the Board. That is true of motions to revoke subpoenas *duces tecum*, as well as other issues of law and fact. That degree of delegation seems to us wholly permissible under this statutory system. We need not go further and consider the legality of the more complete type of delegation to which most of the argument in the case has been directed."

This complete type of delegation, the legality of which was thus pretermitted by this Court in Duval Jewelry, is precisely the type of delegation that was before the Court below. It must be noted that Duval Jewelry was decided at a point in time before the Board's delegation

of its powers in representation cases to the regional director pursuant to section 3(b) of the Act and before the Board's standard of review in representation cases was correspondingly limited.

Respondent's subdelegation argument should be considered in light of the fact that this Court has made it clear that an agency will not be empowered to effect such a complete delegation where, by either the express provisions of the underlying organic statute in question, or by implication, such power has been withheld. *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 121, 67 S. Ct. 1129, 1134 (1947); see *NLRB v. John S. Barnes Corp.*, 178 F. 2d 156, 159 (7th Cir. 1949). The petitioner's claim that the Board is authorized by the Act to delegate its decision-making power in complaint proceedings to trial examiners, must fail in view of the express provisions of Section 10(c) of the Act, 29 U. S. C. § 160(c), to the contrary. Indeed the Board itself has consistently viewed the Act as withholding this authority (see NLRB Statements of Procedure § 101.12, 29 C. F. R. § 101.12)[1] and accordingly, the Board has appealed to Congress to authorize it to bring about such a delegation, while retaining the discretionary right to review the action of its delegate. Although such statutory reorganization plans were approved for the CAB, FTC and FMC (Federal Maritime Commission), the plan for the NLRB was disapproved, along with those for the FCC and SEC.[2] The most recent

[1] See also CCH Current Comments ¶ 8036 (speech by Board Member Fanning on 9/29/66 reaffirming this Board interpretation); Auerbach, Scope of Authority of Federal Administrative Agencies to Delegate Decision Making to Hearing Examiners, 48 Minn. L. Rev. 823, 862-64 (1964); see also NLRB v. John S. Barnes Corp., 178 F. 2d 156, 161 (7th Cir. 1949) (Board's open and consistent construction of Act entitled to weight in determining meaning thereof).

[2] Congressional reports and debates on this proposed (and rejected) reorganization plan for the NLRB (known as "Plan No. 5 for 1961") may be found at H. Rep. No. 576, 87th Cong., 1st Sess. (1961); S. Rep. No. 571, 87th Cong., 1st Sess. (1961); 107 Cong. Rec. 10223, 12 905-32, 13 023, 12069-78 (1961).

edition of the Board's unsuccessful attempts to persuade Congress to authorize such a subdelegation of unfair labor practice jurisdiction to trial examiners appears in the form of a bill recently introduced into Congress by Senator Javits of New York, discussed at CCH Current Comment ¶ 8019.

It would be incongruous, to say the least, if the Board, through the guise of its rule against relitigation, could effectuate by administrative rule an amendment to its organic statute which it has been unable to accomplish through the proper legislative channels. Respondent's contention in this regard should follow *a fortiori* from the above analysis, since the effect of the rule against relitigation is to delegate the Board's decision-making powers in unfair labor practice proceedings not to independent trial examiners, but to regional directors, around whose "judicial" functions even fewer safeguards have been placed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, *et seq.*) are as follows:

Sec. 10 (b) * * * Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

Sec. 10 (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice * * *.

The following provisions of NLRB Statements of Procedure (29 C. F. R. 101.20(c)) are also relevant:

Sec. 101.20(c) The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified official. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions. In most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing officer.